Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

ALLEN LEE MAY,

Petitioner,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, the Court of Appeals for the Sixth Circuit erred in Affirming the District Courts Granting of Summary Judgment for Respondents where the District Court held that no issue of material fact existed for trial on Petitioners claims against Respondents GM,UAW International and UAW Local 749 because: Petitioner raised genuine issues of material fact?

II. Whether the Court of Appeals for the Sixth Circuit erred in Affirming the District Court's application of the correct standard of the McDonnell Douglas v Green analysis to the facts of this case?

III. Does the Summary Judgment Standard in employment discrimination cases require that the issue must be presented to the jury when the Petitioner raised genuine issues of material fact that the Respondents Profferred reason are pretextual?

IV. Does justice and public require that the United States Supreme Court overturn and soften the McDonnell Douglas Corp v. Green (1973), 411 U.S. 792, 93 S. Ct 1817, 36 L.Ed. 2d 668.

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OPINONS BELOW

This is an action for employment discrimination brought by Allen Lee May against his employer GM and UAW International and UAW Local 549. This action was filed on November 13, 2000 in the United States District Court for the Northern District of Ohio and then to the United States Court of Appeals for the Sixth Circuit. Te governing legislation is Title VII, 42 U.S.C. Sec. 2000e, et. Seq., 42 U.S.C. 1981 and Chapter 4112, et. Seq, of the Ohio Revised Code.

This matter began on November 13, 2000, when Allen Lee May, an African-American employed by GM as a pipefitter, filed a complaint to the United Sates District Court for the Northern District of Ohio, therein, be alleged among other things that his employer, GM, and his Union, UAW International and UAW Local 549 discriminated against him on the basis of his race with regard to the opportunity to perform overtime work, the Union failure to process grievances regarding overtime wrongfully denied him which resulted in the denial of his Civil Rights; the Union's revocation of his Welder's Journeyman Card and GM's denial of a welding position. In addition, Mr. May alleges a breach of contract and bad faith representation by UAW LOCAL 549 and UAW International.

GM, UAW International and UAW Local 549 filed Motions for Summary Judgment in the District Court on January 7, 2003. Petitioner, challenged these motions by filing Memoranda in Opposition to these motions asserting that material issues of facts existed which precluded Summary Judgment. Thereafter, GM, UAW International and UAW Local 549 filed their respective Replies. Over and above the Petitioners objections, on April 29, 2002, Honorable Donald C. Nugent issued a

Decision and Order granting the Summary Judgments of GM, UAL International and UAW Local 549 on all issues and dismissing the case. Petitioner Appealed.

On March 20, 2003, the Court of Appeals for the Sixth Circuit affirmed. Granting respondents request, the Court determined Petitioners' Appeal did not establish that comparable nonprotected individuals were treated differently and that Although May applied for a welder's position, the position was filled by an individual who, unlike May, was qualified and had more seniority than May. Therefore, May's allegations regarding racial discrimination fails.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Northern District of Ohio was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C 2000(e), et. Seq., 42 U.S.C. 1981 and 28 U.S.C 1331 (general federal question jurisdiction).

Subject matter jurisdiction for the United States Court of Appeals for the Sixth Circuit was invoked through 28 U.S.C. 41.

The judgment of the Court of Appeals for the South Circuit was entered on March 20, 2003. Justice Stevens signed an Order extending the time for filing this Petition for Carrmaie to and including July 18, 2003.

Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

RELEVENT PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972

42 U.S.C. 2000(e) et. Seq.
42 U.S.C. 1981
28 U.S.C. 1331

STATEMENT OF THE CASE

A. General Background and Description

Allen Lee May is an African American employed by GM as a pipefitter. He was hired by GM on or about October 26, 1983, as a Journeyman Pipefitter in the Michigan facility. During Mr. May's employment at the GM Mansfield facility, he worked as a second-shift Journeyman Pipefitter in the Assembly Tool Builder Group (: "ATB Group") and a member of the UAW Local 549 and UAW International, along with one other second-shift Pipefitter, Gary Mills, who is Caucasian.

During the entire proceeding below, in the District Court, both Petitioner and the Respondents relied almost totally on affidavits as proof of their assertions. Very few documents, were produced by either side, with the exception of Mr. May's deposition and Respondents, production of the Memorandum of Agreement between GM and UAW.

B. Application for the Journeyman Welders UAW Card

Mr. May became interested in obtaining a Welder's Journeyman Card from UAW around arch of 1999. However, UAW International and/or UAW Local 549 refused to process his request and delayed verification of the card. Only after Mr. May re-inquired

as to the status of the cards months later was it processed. The refusal of UAW International and UAW Local 549 to properly process Mr. May's application for a Welder's Journeyman Card assisted GM in the explanation for denying Mr. May the Welder's Journeyman position for which he applied. This statement is verified by the following inserts from Mr. May's deposition:

> Question: –but was it your understanding that without the welding card, the company couldn't put you in this—either one of these positions?
>
> Answer: No, because at the particular time a person qualified, you can go in under the EIT, and what they did was hire a person off the street and put them in how you classify as apprenticeship, so-other—you didn't have to have your journeyman card to have these positions.
>
> Question: Okay. General Motors records indicates that you applied for the Gas and Arc Welder position.
>
> Answer: Yes.
>
> Question: Okay. Did you apply for the Die Welder Position also?
>
> Answer: Yes.
>
> Question: Do you have any documents?
>
> Answer: Yes. I sent them a—

It is evident from Mr. May's deposition that his version of the facts indicated that although Mr. May wanted and desired his journeyman Welder's Card that the card itself did not prevent a person who did not possess a Journeyman Welders card from being awarded either the position for Journeyman Gas and Arch Welder or the position of Journeyman Die Welder. These facts are further confirmed by the job posting, itself, which indicated that on June 17, 1999m two Welding Positions were posted, which stated:

> "The plant has an immediate opening for a Journeyman/woman in each of the trades listed below. Any employee who is currently a Journeyman/woman in either of these Trades is encouraged to apply for the opening by submitting a "729" application in the Plant Personnel Services Center. (Journeyman/woman) Under the GM-UAW National Agreement Requires Proof of Completion of a Bonafide Apprentice Program or proof of (8) years of Experience in the trade. Posted: June 17, 1999 and Removed: June 30, 1999.
> Larry Ware. Hourly Employment Supervisor.

The Memorandum of Understanding Definition of Journeyman/woman is also helpful in interpreting the job posting which states:

> DEFINITION OF "JOURNEYMAN/WOMAN"
> (178) The term "journeyman/woman" when used in this Agreement means an employee who: (1) has satisfactorily completed a bonafide apprentice training course with similar standards to the GM-

> UAW Apprentice Training Program, or (2) one who has properly carried such journeyman/woman status in any General Motors plant under the terms of previous agreements between the parties or (3) one who has been reclassified as a journeyman/woman under the terms of the Skilled Trades Section of this Agreement; or (4) one, newly hired, who meets one of the above alternative requirements or can prove work experience in the trade at least equivalent to that on-the-job experience required for reclassification to journeyman/woman status of those employes-in-traiing covered in Paragraph (166) of this Agreement. Copies of any documents presented pursuant to this provision will be furnished to the Chairperson of the Shop Committee upon request. (Pages 129-130).

The facts are undisputed that GM hired a white female from the outside to fill the Journeyman Die Welder position because the facts indicate that no other welder position was open in 1999. This is verified by GM Answers to Mr. May's Interrogatories and Request for Production of Documents and GM's Brief in Support of Motion for Summary Judgment. In Gm's Motion for Summary Judgment, they stated:

> "Although GM hired a white female from the outside, it was to fill an apprentice die welder position in 1999, completely different than the journeyman gas/arc welder position applied for by Plaintiff. The female employee who filled the position was not a journeyman, because

> the position was for an apprentice (Chuidioni Afd. #2 Note 3)

In addition, GM Answers to Mr. Mays Interrogatories and Request for Production of Documents stated:

> Question # 14: Whether a welding position was open at any time in 1999 and to state the name and race of person who obtained the position?
>
> Answer: Defendant, GM states that a welding position was open in the Mansfield facility in 1999. The following individuals applied for the position: Allen Lee May (African American) Wesley Miller (Caucasian), Steven Cope (Caucasian), Mark Boham (African American) Matthew McGuire (Caucasian), David Wert (Caucasian), Jerry Holsten (Caucasian). The open position was filled by William French (Caucasian).

The above facts indicate that GM could award either position to anyone with any qualification by allowing the applicant to accept the position through the apprenticeship program , if GM so desired.

C. Mr. May's Qualifications for the Journeyman Gas/Arch Welder Position

According to Mr. Mays Affidavit, the following facts are true:

> Mr. May presently possesses three journeyman cards is well aware of the

qualifications to receive a card. Mr. Mays time could be duplicated for the various cards. His present Pipefitters Journeyman card was obtained from working in Local 370, where welding is a combined trade with pipefitting and plumbing. In addition, he even held a welding license. A copy of Local 370's Certified Letter documenting his qualifications, is a part of his employment file. Although not documented by GM in Mr. Mays file. Mr. Mays has performed welding jobs for GM at Saginaw Break Plant and Pontiac Motors when needed. Further, Mr. Mays qualification are in accord the Memorandum of Understanding, Section above Titled : DEFINITION OF JOURNEYMAN/WOMAN, because Mr. May has completed a bonafide apprentice training course with similar standards to the GM-UAW Apprentice Training Program. As such, Mr. May qualified for the position regardless of whether he had a Journeyman Welder Card.

Further, it is undisputed by respondents that no lines of demarcation exist in Mr. May's ATB GROUP and Welders are part of Mr. Mays ATB Group. This is reflected in the MEMORANDUM OF UNDERSTANDING ASSEMBLY TOOL BUILDERS GROUP ("ATB") which states in pertinent parts:

The parties herein recognize the multiple skilled trades people of the assembly tool build group for their success in attracting

new work and new jobs to the plant. It is mutually agreed between the parties that this memorandum of understanding constitutes the assembly tool builder (ATB) agreement in the Mansfield Plant.

The ATB Group consists of the following classifications:

A. Checking Fixture Builder (CFB)
B. WEMR
C. Electrician
D. Pipefitter
E. Welder
F. Millwright
G. Carpenter/Painter

Employees assigned to this group will perform tasks necessary for the completion of the finished products to the fullest extent of their skill levels and ability, consistent at all times with plant safety practices. Although employees will maintain their skilled trade classifications, no lines of demarcation restrictions will be placed on skilled group members working together. Group members will utilize, where it is safe to do so, all plant tools and equipment necessary to complete the work assignment. Due to safety concerns, the termination of wiring in the interrogation cells will be performed by employees classified electrician or W.E.M.R.

As such, members within the group cush as non-pipefitter are performing jobs of pipefitter and pipefitters are performing jobs of non-pipefitters, for

example, whenever necessary to complete the job to the best of the employees skill level.

As stated earlier, and referring specifically to Mr. Mays statements in his deposition testimony, a journeyman welder's card was not needed to qualify for these positions which were posted on June 19, 1999 As evident by the fact that GM awarded the Welder's Die Position to a female from off the street through an apprentice training program or E.I.T. without regard to the fact that Mr. May had appled for the position and had more seniority. The Memorandum of Understanding regarding seniority reads as follows:

> GENERAL PROVISIONS REGARDING SENIORITY
>
> (153) Notwithstanding other provisions of this Agreement, Management may select non-journeymen/women seniority employees who have previously filed an application as provided above for the transfer to the skilled trades classifications for training and to perform the work in such classifications. Employees transferred to skilled trades classifications shall be selected on the basis of their qualifications, (including time worked after January 1, 1968, pursuant to Paragraph (179) unless otherwise mutually agreed between Management and the Shop Committee), and when their qualifications are the equal, employees with the longest seniority will be given preference. The recruitment, selection, employment and training of employees-in-training (E.I.T.) shall be without discrimination because of race, color, religion, national origin, sex,

> or sexual orientation. Affirmative action will be taken to provide equal opportunity in the Employee-in-Training Program (Page 119).

The facts are undisputed that Mr. May applied for both e Journeyman Die Welder Position and the Journeyman Gas and Arc Welder Positions which were posted by GM on June 17, 1999 and that he was offered neither by GM.

D. UAW Revocation of Mr. Mays Journeyman Welders Card, Lack of Representation by Union, Discriminatory and Bad Faith Conduct by Union Representative Ron Willis

UAW International and UAW Local 549 approved Mr. Mays application for a Journeyman Welders Card and then rescinded the card, notifying Mr. May by mail thirty after the card had been issued that the card was now revoked. UAW International made the decision to revoke Mr. Mays Journeyman Welders Card after receiving a telephone call from Mr. Ron Willis, who is currently the shop chairman for UAW Local 549 which is the Union that represents GM employees, including Mr. May. In his sworn affidavit, Mr. Willis made the following statements, explaining the matter.

> I have been elected Shop Chairman for UAW Local 549 for five years. The Shop Chairman is the Chief Local Officer, dealing with labor negotiations and contract administration, such as grievances processing. Part of my duties as a Shop Chairman involve pursuing grievances on behalf of individual union members.

Under the National Agreement, a UAW member employed at GM may receive a journeyman card w o has completed a bonafide apprentice hip program with similar standards to GM-UAW Apprenticeship Training Program or can prove work experience in the trade equivalent to eight years of on-the-job experience (See National Agreement, Exl Section 178 and 166)

I first became aware that Mr. May had applied for journeyman card as a welder, (he laready had a card as a pipefitter) in July 1999, when I received a letter from Uaw International Representative, Al Lewis, that Mr. May would be receiving a welder's journeyman card. Customarily, the application for a journeyman card is started though my office. I immediately called the UAW Skilled Trades Department in Detroit expressing my doubts about his qualifications as a welder. I was familiar with Allen Lee May, his work at out plant and some of his background because in July 1999, Local 549 was actively investigating matter of Mr. May. In the investigation of his claims of lack of overtime and subcontracting work to outside contractors when Local 549 skilled trades workers could perform the jobs. I was made aware of Mr. Mays working skills and background. The Local was also representing Mr. May in disciplinary proceeding by GMC.

> When I called Skilled Trades, I was aware that two other members of the Local were applying for a welders card. Thomas Karbula and David Wert (both Caucasian males). Even though they had experience as a welder, the Skilled Trades Department was requiring proof of eight years experience as a welder, even to the extent of requiring W2's from all these employers. Since the Skilled Trades Department was strictly following the guidelines for these two members, it should strictly be followed for Mr. May. Ultimately, the applications of Mr. May, Mr. Karbula and Mr. Wert were rejected.
>
> In the National Agreement, it recognizes that welding is a separate "apprenticeable" craft from pipefitting and/or plumbing. These are also recognized as distinct in the Local Assembly Tool Builder Group Agreement (ATB).

With the information that Chairman Willis brought to its attention, the Skilled Trades Department reconsidered its action on May and decided to disapprove the reclassification. On August 23, 1999, the Skilled Trades Department notified May that his card was being revoked and at that time his pipefitter-plumber card was reinstated. (See Klea letter attached to Peterson Aff. As Ex 2) May filed an appeal of the reconsideration action of the Skilled Trades Department. On December 15, 1999, William J. Peterson, Assistant Director of the Skilled Trades Department, notified May that his appeal had been rejected. He noted, "the policy of the Skilled Trades Department is that the trades of pipefitters and welder maintenance

and construction are not related, therefore, no time can be counted towards your reclassification." Essentially, the time used by May to qualify for his pipefitter card could not also be used to qualify for welders card.

Respondents, UAW International and UAW Local 549 provided the following answers to Mr. Mays Request for Interrogatories and Request for Production of Documents:

> 2. Identify each applicant for a welder journeyman card for the years 1998 through 2001.
>
> Answer: Tom Karbula, Allen Lee May (transfer from one craft to another), Jerry Montgomery, David Wert
>
> 8. For each applicant, identified in response to Interrogatory No. 6 state whether the International Union approval was revoked at any time and the date(s) thereof.
>
> Answer: May was the only member whose application was initially approved, but denied upon reconsideration.

With the above facts in mind, although disputed by respondents, the facts could be reasonably assumed that since ATB members possess multiple trades and skilled that such member of the ATB group would be permitted by UAW to count time worked in multiple trades toward obtaining more than one journeyman card, if in fact, the journeyman worked in multiple trades during the time period for eight years. Which is the version of the facts as asserted by Mr. May.

Respondents produced no rules or procedures or logical explanations to substantiate their claim than an employee's time spent working in multiple trades could not be counted towards more than one journeyman card.

E. Qualifications of Mr. William French, the GM Employee who received the Gas and Arc Welder Position for which Mr. May Applied

GM stated in their Brief in Support of their Motion for Summary Judgment that William French was awarded the position because Mr. French had a seniority date of July 12, 1965, had more seniority than Mr. May whose seniority date is December 13, 1983 and already possessed a Journeyman Welders Card, as he held a welding position at another GM plant. Mr. French's qualifications for the position were verified by and sworn affidavit from Thomas Chiudioni which states in pertinent parts as follows:

> I am currently employed by General Motors Corporation in Mansfield, Ohio, as a Labor Relations Analyst.....
> On July 17, 1999 the Mansfield facility posted job openings for a journeyman die welder and journeyman gas and arc welder. On June 18, 1999, May applied for the gas and arc welder position. Including May. Eight GM employees applied for the gas and arc welder position. Open positions that are filled internally are awarded to the qualified employee with the most seniority that applies for the position. William French, who has a seniority date of July 12, 1965 eventually filled the gas and arc welder position. May

> was not qualified for the welding position because he was not classified as a journeyman welder and did not have a journeyman welders card from the UAW. Without a journeyman welder card from the UAW, the company could not have given May the gas and arc welder job that he applied for, regardless of his seniority.

The above affidavit was the only evidence offered in supprt of GM's claim that Mr. French was more qualified because he already held a journeyman welder's card and had more seniority than Mr. May. As stated earlier, GM did not produce Mr. French's employment file nor provide any other documentation except the above affidavit to support their claim that Mr. French was more qualified than Mr. May and possessed more seniority than Mr. May.

F. Adverse Employment Action of GM's Denial of Welding Position Caused Mr. May Lost of Overtime Compensation

According to Mr. Mays deposition and Affidavit, the welders were working substantially more over time hours than his present pipefitting department. Therefore, Mr. May suffered a lost of overtime compensation due to GM's denial of the welding position to him. Respondent GM challenged these facts by stating that May had suffered no Adverse Employment action. However, GM did not challenge Mr. Mays claim of loss overtime as false. Nor did they produce any evidence disputing this claim. GM stated in their brief in Support of their Motion for Summary Judgment that Mr. May had not proven that he would have obtained more overtime compensation as a welder.

G. Sixth Circuit Affirms

On May 24, 2002, Petitioner filed a timely notice of appeal. On March 20, 2003, by Memorandum Decision and Opinion, the Court of Appeals for the Sixth Circuit affirmed it found that the appellant Allen Lee May did not establish that comparable nonprotected individuals were treated differently and that although May had applied for a welding position, the position was filled by an individual who unlike May was qualified and had more seniority than May, and therefore, May's allegations regarding racial discrimination fails.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURTS GRANTING OF SUMMARY JUDGMENT FOR RESPONDENTS WHEN THE DISTRICT COURT HELD THAT NO ISSUES OF MATERIAL FACT EXISTED FOR TRIAL ON PETITIONERS CLAIMS.

A. Summary Judgment Standard

The Fed. R. Civ. 56(C) places a mandatory duty on a trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. The failure of a trial court to comply with this requirement constitutes reversible error. Murphy v. City of Reynoldsburg, 65 Ohio St., 3d, 604 N.E. 2d 138 (Ohio 1992). An appellant court (like a trial court) must examine the record to determine whether there is a genuine issue of material fact. An appellant court reviewing a trial court's decision to grant a Fed. R. Civ. 56 (C) motion must look at the

evidence in a light most favorable to the non-moving party, construing all doubts in favor of that party.

In the present case, neither the District Court nor the Court of Appeals for the Sixth Circuit scrutinized the conflicting facts in the case nor resolved them in favor of he petitioner. The facts in petitioner's affidavit, deposition, Answers to Interrogatories and exhibits were clearly in dispute with Respondents GM, UAW International and UAW Local 549. Both Petitioner and Respondents relied basically on evidence submitted in affidavits to confirm their version of the facts. (With the exception that Petitioner's presented substantial exhibits that Mr. May had received several disciplinary action for coming to work in a hung over state and that they suspected that he had problems with alcohol abuse). Petitions were very successful below in their used of their allegations of work related disciplinary actions relating to alcohol abuse to distract the lower court's attention away from the real issues of discrimination.

Issues of material fact existed in the present case as to be whether Petitioner was qualified for the position for several reasons mentioned above. UAW International initially approved Mr. Mays application for a Journeyman Welders Card and later revoked the card after UAW International received a phone call from Ron Willis, Union Representative, whose job was to advocate on behalf of Mr. May. Instead, Mr. Willis comments to UAW International resulted in the revocation of Mr. Mays Journeyman Welders Card.

."A union breached its duty of fair representation when its conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad

faith." McKee v. Youngstown Steel Door Co. (1980), 4 Ohio App. 3d 32

Ron Willis, union representative's behavior in calling UAW International and stating that Mr. May was not qualified to receive a journeyman welders card which resulted in the revocation of Mr. Mays' Journeyman welders card was a breach of UAW duty of fair representation because the conduct was discriminatory and in bad faith.

In determining whether comments made in workplace constitute unlawful discrimination, issue before the court is whether there is a nexus between the comments and the plaintiff's employment. Whether comments are made by person's having decision making authority is not determinative. South v. Firestone Tire and Rubber Co 875 F2d 1325. 1330 (C.A. 7 1989)

In the present case, Mr. May has shown this nexus between the union representative Ron Willis' remarks to UAW International that Mr. May did not qualify for the journeyman welder's card, which is an adverse employment decision.

In Chavez v. Coors Brewing Co., (C.A. 10, 1999) 176 F 3d 488, 488, the court stated, " Pretext may be demonstrated by showing such weakness, implausibilities, inconsistencies, incoherences or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could find then unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.

In the present case, respondent GM proffered reason that Mr. May was not granted the welding

position because he was not qualified because he did not have a welders journeyman card. GM alleges that the position was awarded to William French because he possessed the welders journeyman card and had more years of seniority than Mr. May is pretextual.

This issue of pretext is properly inferred because GM refused to produce the employment file of Mr. French and provided no other documentation that Mr. French did possess a welders journeyman card and had more seniority than Mr. May. Mr. French's qualifications were only verified by an affidavit from Respondent GM's employee, Mr. Chiudioni. Further, Respondent GM answered to Mr. Mays interrogatories and request for production of documents stated that only one welding position was open in 1999. Whereas the job posting itself stated that there were two welding positions open: a journeyman gas and welding position and a journeyman die welding position. Mr. Chiudioni's affidavit provides further conflicting information regarding the open position when he states in his sworn affidavit that there was an apprentice die welding position open in 1999, which was filled by a white woman off the street, but that that position was completely different from the position applied for by Mr. May. However, Mr. May stated in his deposition that he applied for moth positions and he further states that no journeyman welders card was necessary to obtain either of the positions.

The above are all issues of material facts which should have been considered by the Federal District Court and the Court of Appeals for the Sixth Circuit erred when it affirmed the granting of summary judgments for respondents by the Federal District Court.

II. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURTS APPLICATION OF THE IMPROPER LEGAL STANDARD IN MCDONNEL DOUGLAS CORP V. GREEN

Petitioner now addresses the issues involving the standard of review in race discrimination claims. These issues involve question of law, essentially, whether the trial court applied the proper legal standards. The general formula to be used in all discrimination cases involves three steps established in McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S. Ct 1817, 36 L. Ed. 2d 668. The first step require the plaintiff to establish a prima facie case in which the plaintiff alleged the employer did not rehire him on basis of race, such a prima facie case can be established by the plaintiff: (1) the plaintiff belonged to a racial minority; (2) the plaintiff applied and was qualified for the job; (3) the plaintiff was rejected and (4) after such rejection, the position remained open and the employer continued to seek applicants with plaintiffs qualifications. McDonnell Douglas at 802. The court noted that facts will vary in Title VII cases and as such, the prima facie case spelled out above may not be applicable to every case. Id at note 13. Hence slight modifications to the above prima facie requirements have been made depending on the type of discrimination alleged and/or the facts in a particular case.

In the present case, the Federal District Court erred as a matter of law in applying but one standard in reviewing petitioners prima facie case and in concluding petitioner failed to establish prima facie case. The prima facie case applied by the Federal District Court is an acceptable method but not the only method by which to establish a prima facie case is a suit alleging racial

discrimination. Mitchel v. Toledo Hosp (CA 6, 1992) 964 F 2d577, 582. Hence Mr May could attempt to prove his prima facie case by showing the first three prongs: 1) Plaintiff was a member of the protected class; (2) The plaintiff applied for a position for which he was qualified and was rejected, (3) that the person hired was outside of the protected class.

In the case at bar, plaintiff can establish a prima facie case by applying the third prong that Mr. French was a person hired outside of the protected class. Since Mr. French was white. Rather, the District Court incorrectly concluded that Mr Mays claim failed because " he failed to support the allegations with evidence that a similarly situated non-minority, with the same qualifications, was, in fact hired. The District Court then further concluded that Mr. William French was not similarly situated.

The question then becomes whether this constitutes reversible error, since the Federal District Court and the Court of Appeals erred in allowing only one standard to Petitioner Prima Facie Case and further erred in that neither court applied the remaining two burden shifting steps in the McDonnell Douglas analysis, these two important failures of the Federal District Court and the Court of Appeals was reversible error.

III. THE SUMMARY JUDGMENT STANDARD IN EMPLOYMENT DISCRIMINATION CASES REQUIRE THAT THE ISSUE MUST BE PRESENTED TO THE JUY WHEN THE PETITIONER RAISES THE GENUINE ISSUES OF MATERIAL FACT THAT THE RESPONDENTS PROFERRED REASONS ARE PRETEXTUAL.

Because a qualified person could be hired through the EIT program as the unidentified white applicant had been. She was granted a Welders position which was also posted on June 17, 1999. In addition, Ron Willis and Mr. Chiudioni both stated in their affidavits that positions are granted internally to the qualified employee who applies for the position. Finally, the job posting itself, of June 19, 1999 instructs present employees who possess journeyman/woman welding cards to fill out the applicable application (Form 729). Yet it is undisputed that Mr. William French never applied for the position. Respondent, GM produce no dates as to when Mr. French transferred into the Gas Arc Welding position.

When taken together, all these aforementioned conflicting inconsistencies indicate that GM proffered reason regarding the filling of the position by Mr. William French are pretextual. As such, a dispute of the facts exist for the trial of fact on the issue of whether Mr. French was better qualified than Mr. May for the Welding position and whether GM Proffered reason was pretextual and motivated by racially discriminatory intent. Further, the evidence shows that there was a Die Welding position also open in 1999, for which the petitioner did apply. Respondent G presented no evidence regarding that position and denied that any other welding positions were open except a short mention of a die welding apprentice position, which was filled by an unknown white woman, with no evidence as to when that position was open or posted to employees.

The trial court ignored two significant procedural facts: Although Mr. May retains the ultimate burden of persuasion, the burden of producing evidence continues to alternate between the parties. Texas Dept. of

Community Affairs v. Burdine (1981) 450 US 248, 252-253 101 . Ct 1089, 67 F Ed 2d 207.

For the afore mentioned reasons, Respondent GM has failed in their burden of production. Public Policy required that the decisions of the United States Court of Appeals be reversed because the Summary Judgment based on the facts of this case is simply wrong. The lower courts did not interpret the evidence in favor of the petitioner, Mr. May, but instead in favor of the respondents. The Lower Courts were swayed by the Respondents arguments that Petitioner Allen Lee May was disciplined several times for alcohol abuse. Using this argument, the Petitioners were successful in discrediting the Petitioner before the lower Courts. To allow this decision to stand deprives petitioner of his right to be free from discrimination in his work place.

IV. JUSTICE AND PUBLIC POLICY REQUIRES THAT THE UNITED STATES SUPREME COURT OVERTURN OR SOFTEN THE MCDONNELL DOUGLAS COPR V. GREEN LANDMARK CASE 411 U.S. 792 (1983)

The McDonnell Douglas framework which is a vehicle to prove discrimination through indirect evidence when the employee has no evidence of direct discrimination. However, the affect of the McDonnell Douglas Frame work is deficient in that it requires much of the employee and little of the employer. For example, the employee has the burden of proof, while all the employer has to do is articulate some legitimate, non-discriminatory reason for the employer's action, in order to rebut the presumption after the employee has established a prima facie case. If the employer carries his burden of producing evidence that his actions were for a non-discriminatory legitimate reason, then the

presumption of discrimination drop from the case. Finally, the employee must then prove that the employer's reasons for its actions were pretextual.

McDonnell Douglas vs. Green was decided in 1973. Over 30 years ago. Much has changed since that time. Originally the framework was intended to guide the court and the parties to establish circumstantial evident of discrimination when the employee had no evidence of direct discrimination. However, since McDonnell Douglas was decided over 30 years ago, Employers are much smarter and educated. Only about 1-2% of litigated discrimination cases exist where there is actual evidence of direct discrimination. As such, McDonnel Douglas has become the corner stone and framework which guides and directs all the Court in the United States.

Unfortunately, the framework requires so much proof on the part of the person bringing an employment discrimination case that the very vehicle it was chosen to do is eaten up. As such, Petitioner advocates that the present time is ripe to review McDonnell Douglas v. Green, prima facie case, circumstantial evidence formula because the affect of the formula impacts too greatly on the employee who sues his employer for discrimination and too softly on the employer being sued, resulting in the rule of law having virtually no affect.

The majority of discrimination cases are decided against the plaintiff by Summary Judgment because the plaintiff (employee) is unable to carry the burden of proof under the framework. The fact is further complicated by the summary judgment rules when the Judge must decide the difference between a long, lengthy trial and the evidence before him now.

The McDonnell Douglas framework of proof on the plaintiff is so harsh that many attorneys refuse to accept discrimination cases because their chances of surviving a summary judgment motion are almost none existent in the Sixth Circuit.

On the other hand, if it is not the rule itself that should be over turned or modified, then there exists at this time needed guidance from the United States Supreme Court to the Lower Courts, who are responsible for correctly applying the rule of law.

A plaintiff is fortunate indeed, if he can find an attorney to represent him in his discrimination suit. Because of the expensive legal cost and/or long litigation, most employees can't afford to hire an attorney. For the same reason, many attorneys refuse to litigate employment discrimination cases. Further, attorneys have the additional worry of losing at the trial level on Motion for Summary Judgment.

The majority of plaintiffs who have lost at the trial court level lack the funds and/or courage to pursue the case further to the Court of Appeals. As such, if a plaintiff is lucky enough to get past the hurdles of locating an attorney, obtaining the money for legal fees and a dose of courage and finally makes his way through the courthouse steps, he expects to find justice there. Unfortunately, and many to many times, justice is not there. If not in the courts, then where is justice? Is Justice lost? Yes, Justice is lost in the courts granting of the employer's Motion for Summary Judgment.

A court in deciding on a motion for summary Judgment should focus on the employer's burden of production and consider carefully whether the employer has met this burden. A court should be very slow to

decide summary judgment motion where as in the present case, the employer's only production of evidence consists of affidavits only without supporting documents. Such affidavits are easily obtained. Whereas, employment files, applications for employment and the like are not easily manufactured, and, as such are better forms of evidence.

This court should grant this petition to: reassert the importance of the lower court applying the correct standard of the McDonnell v. Green analysis to the facts of employment discrimination cases, impress upon the lower courts the flexibility of the standard and give guidance to the lower courts on the types of better evidence which should be produced by an employer before granting Summary Judgment.

CONCLUSION

THEREFORE, Petitioner, Allen Lee May requests of this court that it GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 02-3589

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLEN LEE MAY,
Plaintiff-Appellant,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,
Defendants-Appellees.

March 20, 2003, Filed

COUNSEL: For ALLEN LEE MAY, Plaintiff - Appellant: James H. Banks, Dublin, OH.

For GMC MANSFIELD METAL FABRICATING, Defendant - Appellee: James M. L. Ferber, Alison Day Hall, Littler & Mendelson, Columbus, OH.

For UAW INTERNATIONAL, UAW LOCAL 549, Defendants - Appellees: Frederick G. Cloppert, Jr., Cloppert, Latanick, Sauter & Washburn, Columbus, OH.

JUDGES: Before: MARTIN, Chief Judge; KENNEDY and DAUGHTREY, Circuit Judges.

OPINION: ORDER

Before: MARTIN, Chief Judge; KENNEDY and DAUGHTREY, Circuit Judges.

Allen Lee May, an Ohio resident represented by counsel, appeals a district court judgment dismissing his civil action filed pursuant to 42 U.S.C. §§ 1981, 2000e (Title VII) and Chapter 4112 of Ohio Rev. Code. May also alleges a breach of contract. The parties have waived oral argument, and this panel agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary relief, May sued the United Auto Workers International, the Local United Auto Workers (Union), and General Motors Corporation (GM) alleging discrimination regarding the opportunity to perform overtime work, the opportunity to work a fourth of July shut down, the union's failure to process his grievance regarding the denial of overtime, the disciplinary action filed against him, the union's revocation of his journeyman's welders card, and the denial of a welding position. The district court granted summary judgment to the defendants.

In his timely appeal, May asserts that the district court erred in concluding that: 1) he did not present evidence of discrimination; 2) the actions complained of were not racially motivated; the evidence was insufficient to establish a hostile work environment; and 4) the UAW did not act in a discriminatory fashion or breach its duty of fair representation.

The district court's judgment is reviewed de novo. *See Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). A Title VII race discrimination claim is analyzed in accordance with the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), which requires that a plaintiff must first prove a prima facie case of discrimination. *Id.* at 802. In order to establish a prima facie case of race discrimination, the plaintiff must show that: 1) he is a

member of a protected class; 2) he was subjected to adverse employment actions; 3) he was qualified for the position in question; and 4) he was replaced by a nonprotected person or similarly situated nonprotected employee receiving preferential treatment. *Id.* In order to compare his treatment to that of a nonprotected employee, the plaintiff must show that he or she is similarly situated to the nonprotected employee in all relevant respects. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998).

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas Corp.*, 411 U.S. at 802. If the defendant is able to establish a nondiscriminatory reason for the adverse action, the burden shifts back to the plaintiff to produce credible evidence that the reason offered by the defendant is a mere pretext for unlawful discrimination. *Id.* at 804.

As the district court noted, May did not present any direct evidence of discrimination. Although he claimed to have been treated differently from similarly situated non-minority employees, the evidence, as extensively summarized by the district court, establishes that comparable nonprotected individuals were not treated differently. The evidence regarding May's complaint as to overtime and overtime assignments do not show any discriminatory conduct. The same is true regarding his application for a welding position. Although May applied for a welder's position, the position was filled by an individual who, unlike May, was qualified and had more seniority than May. Therefore, May's allegation regarding racial discrimination fails.

May contends that the defendants' actions created a hostile work environment. In order to establish a claim for a hostile work environment, a plaintiff must demonstrate that: 1) he was a member of a protected class; 2) he was subject to harassment; 3) the harassment was based on his race; 4) the harassment unreasonably interfered with his work performance; and 5) the defendant knew or should have known about the harassment and failed to take corrective measures. *See Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872 (6th Cir. 1997). The Supreme Court has elaborated on what type of conduct can constitute harassment and form the basis of a hostile work environment claim. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). To prevail, the plaintiff must show conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and [to] create an abusive working environment." Conduct that is "merely offensive" will not suffice to support a hostile work environment action. *Id.*

The facts establish that May was not subject to a hostile work environment. The record reflects that May's problems were a result of his alcohol abuse and that both GM and the union went to great lengths to assist May. Although May identified three events which he contends were racially motivated, when management was notified of the events, the offensive objects were immediately removed. Thus, the fifth prong of the hostile work environment action as set forth in *Blankenship* was not satisfied.

Finally, May asserts that the union acted in a discriminatory manner and breached its duty of fair representation. A union breaches its duty of fair representation if its actions are either arbitrary,

discriminatory, or in bad faith. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994). A union's actions will be considered "arbitrary" only if "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots Ass'n. Int'l v. O'Neill*, 499 U.S. 65, 67, 113 L. Ed. 2d 51, 111 S. Ct. 1127 (1991) (citations omitted). Consequently, "[a] union does not ... have to exhaust every possible remedy requested by a member facing disciplinary action." *Black*, 15 F.3d at 585 (citations omitted). Instead, "a union acts arbitrarily only if 'it handles a grievance in a "perfunctory" manner, with with caprice or without rational explanation.'" *Linton v. United Parcel Servs.*, 15 F.3d 1365, 1370 (6th Cir. 1994) (citations omitted).

The record establishes that the union acted aggressively to represent May's interests. Under no circumstances can the union's actions be considered "without rational explanation." *Id.* The union successfully settled many of May's grievances on his behalf and got numerous disciplinary actions expunged from May's employment record. To contend that the union's actions were a breach of fair representation is meritless.

Accordingly, we affirm the district court's judgment.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits,privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000c

As used in this subchapter -

(a) "Secretary" means the Secretary of Education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.